September 18, 2019

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022, RIN 3170-AA41, 84 Fed. Reg. 23,274 (May 21, 2019)

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned notice of proposed rulemaking ("Proposal" or "Release"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). The Proposal would establish comprehensive rules implementing the Fair Debt Collection Practices Act ("FDCPA")[2] by interpreting particular provisions of the FDCPA and prescribing rules relating to debt collection communications and disclosures.[3] The Proposal also attempts to account for the significant changes in technology and communications that has occurred since the FDCPA was passed in 1977.

Congress's purpose in enacting the FDCPA was crystal clear—to protect consumers from abusive debt collection practices. As clearly set forth in the statute's declaration of purpose, "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors." The FDCPA was **not** passed to make collection of debts easier, cheaper, or more efficient for debt collectors. Thus, the overriding perspective of the Bureau as it reviews comments and finalizes the Proposal must be **consumer protection**, not predator protection; enhancing consumer protection should be the determinative factor in shaping each and every aspect of the final rule.

Some aspects of the Proposal clearly would enhance consumer protection. However, other aspects of the Proposal appear to be outwardly hostile to consumer protection. And, as to some, it is not apparent how, if at all, the provision would enhance consumer protection. The Bureau must not finalize any provision that would conflict with the overriding consumer protection purposes of

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 15 U.S.C. §§ 1692-1692p.

3 Release at 23,274.

the FDCPA. If it does, the Bureau will have failed to carry out its core mission, and it will also have produced a rule that is contrary to the intentions of Congress in passing the FDCPA and vulnerable to legal challenge under the Administrative Procedure Act ("APA").

BACKGROUND

Debtor's prisons, at least those with concrete walls, were gone from America by the turn of the twentieth century. However, those who struggled to pay their bills were often subject to a different form of confinement, frequently becoming trapped in an endless storm of harassment by debt collectors. And those practices have continued into the modern era, largely because of the powerful incentives motivating debt collectors coupled with the vulnerabilities of the debtors who are targeted in the process.

Once a debt reaches an advanced stage of delinquency, the original creditor (or their assignee) will often turn over attempts to recover the debt to a third-party debt collector.[4] That debt collector may earn a fee or commission for every dollar of the debt recovered, or the debt collector may purchase the debt outright, at a steep discount to the face value, and then attempt to collect the debt, with every dollar above the purchase price (and cost of collection efforts) representing profit. In any event, third-party debt collectors' compensation is tied exclusively to recovering as much delinquent debt as possible, and accordingly debt collectors have historically been willing to go to extreme lengths to collect debts. Indeed, prior to passage of the FDCPA, the common practices of debt collectors would shock the conscience. Debt collectors called consumers for hours on end; called in the middle of the night; contacted friends and neighbors in an attempt to publicly shame the debtor; contacted employers and attempted to have the debtor fired; threatened debtors with criminal prosecution; and taking a page from Mafia loan sharks, even threatened debtors with physical violence.[5]

And while the tactics that debt collectors deploy have been extreme, they are the natural consequence of the incentives in play. Because debt collectors' profits are tied exclusively to how much debt they are able to collect, and because debt collectors are not selected by debtors themselves, but by the creditors, they have every incentive to engage in ruthless collection practices. They have no need to temper their collection practices, either to maintain an individual customer relationship or to protect their reputation and ensure that they will be able to attract and keep future customers[6]—indeed, from a reputational standpoint, it could be said that the more aggressive a debt collector, the better their reputation among creditor clients.[7] In other words, only

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4 "First-party creditors," i.e. the original creditor, are generally not subject to the FDCPA.

5 Logan Kraus, *A Forgotten Past Creates A Fractured Present: Why Courts Should Utilize Historical Context When Interpreting Ambiguous Provisions of the 1977 Fair Debt Collection Practices Act*, 102 IOWA L. REV. 1789, 1796 (2017).

6 S. REP. 95-382, at 2 (1977).

7 *See* Viktar Fedaseyeu & Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts*, FRB Working Paper No. 15-43 at 8n.9 (Nov. 2015) ("Therefore, it is

strong protective legal rules and the credible threat of liability for violation of those rules can reasonably prevent abusive conduct by debt collectors.

Moreover, by the time collection of a debt is turned over to a debt collector, it is likely that the debt is seriously delinquent, which in turn means it is likely the debtor is facing serious, unexpected, and typically inescapable financial hardship.[8] That serious financial hardship means not only that the debtor is likely struggling just to meet their basic needs such as food, housing, and medical care, but also that they are dealing with many of the documented deleterious health effects associated with the stress of financial hardship, up to and including increased mortality.[9] And debtors typically lack the means to afford their own legal counsel to fend off the debt collectors. In other words, the victims of debt collectors' abuse are often among the most vulnerable members of society most in need of legal protections.

Thus, debt collection involves an industry with every incentive to abuse and exploit consumers to the fullest extent possible, and a subset of consumers likely to be especially vulnerable to that exploitation and abuse. Recognizing the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"[10] and the resulting urgent need for a corrective to this inherently toxic environment, Congress passed the FDCPA in 1977 to reign in the worst practices of debt collectors. Broadly speaking, the FDCPA sought to protect consumers by prohibiting harassment and abuse by debt collectors, such as threats of physical violence or use of public shaming lists; regulating permissible communications between debt collectors, including prohibiting communications with consumers at inconvenient times or places; generally prohibiting debt collectors from discussing debts with third-parties; and prohibiting deceptive, unfair, or unconscionable practices in the collection of debt.[11] The FDCPA also subjected debt collectors to civil liability for violations, either through private civil lawsuits or through administrative enforcement by the Federal Trade Commission.[12]

While the FDCPA has been relatively successful "in curbing some of the abuse and harassment stemming from collection companies," it has not been uniformly successful in protecting consumers from abuse and harassment.[13] Part of the problem is that, prior to the 2010 passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[14] which gave the

likely that lenders allocate debt collection of charged-off accounts to third-party agencies because those agencies can use harsher debt collection practices.").

8 *See id.* (noting that when "default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.").

9 Reginald D. Tucker-Seeley, et al., *Financial Hardship and Mortality among Older Adults Using the 1996–2004 Health and Retirement Study*, 19 ANN. EPIDEMIOLOGY 850 (2009).

10 15 U.S.C. § 1692(a).

11 15 U.S.C. § 1692, *et seq.*

12 15 U.S.C. §§ 1692k, 1692l(a).

13 Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723-24 (2006).

14 Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act").

Bureau the rulemaking authority it is now exercising, no federal agency had authority to prescribe rules implementing the FDCPA.[15] Accordingly, interpretation of some of the more purposefully broad and ambiguous provisions—such as what constitutes an "unconscionable" or "unfair" collection practice—was left primarily to courts adjudicating issues on a case-by-case basis. The result has been often conflicting interpretations of the same FDCPA provisions, potentially leaving significant gaps in consumer protection.[16] This problem is especially acute when courts are confronted with evolving technologies that did not exist when the FDCPA was passed,[17] and with evolving debt collector practices, often designed to evade the specific restrictions of the FDCPA.[18] And of course, because of the prohibitive expense of a lawsuit, many consumers cannot or will not go to court to vindicate even a clear violation of the FDCPA, let alone take on the litigation risk where recovery is less certain because it involves an ambiguous provision.

In the Dodd-Frank Act, Congress gave the Bureau authority to implement FDCPA rules primarily because of the shortcomings evident in mere reliance on the statutory text and private lawsuits in curbing abusive debt collection practices.[19] As it moves forward in finalizing the rule, the CFPB must keep in mind Congress' intent, both in originally passing the FDCPA in 1977 and in granting the Bureau with rulemaking authority in 2010, to protect consumers.

SUMMARY OF PROPOSAL

Generally speaking, the Proposal focuses on interpreting various ambiguous aspects of the FDCPA, particularly as it relates to permissible communications with consumers, communications with third-parties, and the provision of information as it relates to the debt. The following summarizes the elements of the Proposal relevant to our comments.

Allowing Limited-Content Messages Exempt from the Definition of Communication

Various protections of the FDCPA hinge on the statutory definition of "communication," i.e. "the conveying of information regarding a debt directly or indirectly to any person through any medium."[20] For example, a debt collector must send a validation notice within five days of the "initial communication" with the consumer.[21] Similarly, "communications with third-parties" are

[15] Release at 23,278.
[16] Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723 (2006) (explaining criticism of the FDCPA's "many ambiguities, which are illustrated by the fact that courts have been unsuccessful in interpreting the statute in a predictable manner.").
[17] *See* Release at 23,278.
[18] Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 724 (2006) (explaining that the debt collection industry "adapted and started to implement new technology-based strategies" that are "unfair to the average consumer.").
[19] Release at 23,310; S. REP. 111-176, at 19 (2010).
[20] 15 U.S.C. § 1692a(2).
[21] 15 U.S.C. § 1692g(a).

generally prohibited. According to the Bureau, uncertainty over whether a particular message constitutes a "communication" may make collection efforts more difficult—for example, debt collectors may hesitate to leave a voicemail for a particular consumer for fear that, if the telephone number is accessible by someone other than the consumer (or, in fact, does not belong to the consumer), they will have violated the FDCPA's prohibition on communications with third-parties.

The Bureau thus proposes to define a new type of message under the FDCPA, the "limited-content message," a form of communication that would be explicitly exempted from the definition of "communication."[22] Because it would not be considered a "communication," a debt collector could leave a limited-content message with a consumer without risking a violation of any of the provisions of the FDCPA whose applicability turns on whether a message is a "communication." A limited-content message would be required to include: (1) the consumer's name; (2) a request that the consumer reply to the message; (3) the name(s) of one or more natural persons the consumer can contact to reply; (4) a phone number the consumer can use to reply; and (5) if sent via text message, information for how the consumer can opt-out from electronic communications.[23] A limited-content message could, at the debt collector's option, also include a salutation, the date and time of the message, a generic statement that the message relates to an account, and suggested dates and times for the consumer to reply.[24] In order to be a limited-content message, a message could **only** contain the required and optional content—a message with any additional content would not meet the definition, and thus would not necessarily be exempt from the definition of "communication."

Facilitating Electronic Communications

The Proposal includes several provisions that would facilitate the use of electronic communications, such as email and text messages which, under the current FDCPA regime, entail a relatively high risk of FDCPA violations, especially unlawful communication with a third-party regarding a debt.[25] For these reasons, according to the Bureau, debt collectors rarely use email or text messages to communicate with consumers, even though many consumers generally prefer to communicate by email or text.[26] The Proposal seeks to facilitate greater use of emails and text

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22 Release at 23,289.

23 Release at 23,399.

24 Release at 23,400.

25 From the debt collector's perspective, any communication that does not involve direct interaction with a particular consumer involves a relatively high risk of improper communication with a third-party, leaving methods of communication such as text message or email as entailing unusually high risk of liability as compared to telephone conversations or postal mail. Release at 23,299.

26 Release at 23,299-300. It should be noted that, even if a consumer generally prefers to communicate by email or text, including with financial services providers, that does not mean they prefer to communicate by email or text **with debt collectors**, since many consumers may consider revelation that they have a debt in collection a more significant invasion of privacy than, for example, revelation that they have a deposit account or credit card.

messages by debt collectors to facilitate contact with consumers by establishing a safe harbor from civil liability for text message or email communications that inadvertently violate the prohibition on third-party communications.[27] To qualify for the safe harbor, the debt collector would have to maintain "procedures that include steps to reasonably confirm and document" that the debt collector communicated with the consumer using:

- An email address or phone number the consumer "recently used" to contact the debt collector (other than for opting out of electronic communications);
- A non-work email address or phone number, if the debt collector notified the consumer it might use that contact information, and gave the consumer a chance to opt out; or
- A non-work email address or phone number the consumer gave to the creditor or a prior debt collector, who in turn "recently sent" a message to the consumer using that medium, without the consumer requesting the prior creditor or debt collector cease using that email or phone number to communicate with the consumer.[28]

The debt collector would also have to show that it "took additional steps to prevent communications using an email address or telephone number that the debt collector knows has led to a" prohibited disclosure.[29] Finally, the debt collector would have to include, in each electronic communication, information on how the consumer may opt-out of such communications, and would be prohibited from conditioning opt-out on payment of any fee or provision of "any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt out."[30]

Limiting the Frequency of Communications

The FDCPA generally prohibits a debt collector from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of debt," including a specific prohibition on "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[31] The Proposal would make it a *per se* violation of this provision for a debt collector to place a call to a particular person regarding a particular debt more than seven times within a seven day period, or to place a call to a particular person regarding a particular debt within seven days after having a telephone conversation with that particular person about that

27 The safe harbor is being proposed pursuant to 15 U.S.C. § 1692k(c), which provides that debt collectors cannot be held liable for violations of the FDCPA if "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."
28 Release at 23,400-401.
29 Release at 23,401.
30 Release at 23,401.
31 15 U.S.C. § 1692d.

particular debt.[32] A debt collector who complied with call frequency limits would have *per se* complied with this provision of the FDCPA.[33]

Because the Proposal's frequency limits would be with regard to a **particular** debt, a debt collector could place more than seven calls to consumers within a week, or engage in more than one conversation with a consumer within a week, if those calls related to different debts.[34] In addition, the Proposal does not contain frequency limitations with respect to electronic communications.[35]

Prohibiting Suits or Threats to Sue on Time-Barred Debt

The FDCPA generally prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."[36] Courts have routinely held that a debt collector violates this provision by suing, or threatens to sue, on a debt that is time-barred.[37] The Proposal would codify these court decisions by prohibiting debt collectors from suing or threatening to sue on a debt they **know or should know** is time-barred.[38] Notably, predicating liability on the debt collector's knowledge stands in stark contrast to the weight of authority that the FDCPA is a strict liability statute, and thus that a debt collector is liable for violations of the FDCPA, including with respect to the provision prohibiting false or misleading statements, notwithstanding that it did not know, or have reason to know, that its conduct constituted a violation.[39]

COMMENTS

The need for a rule implementing the FDCPA, and thereby clarifying and interpreting its various provisions, has been painfully obvious for years.[40] Congress explicitly recognized that need when it gave the Bureau authority to prescribe FDCPA rules in the Dodd-Frank Act.[41] As it exercises this authority, finalizes the Proposal, and fills this regulatory gap, the Bureau must

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32 Release at 23,310-11.

33 Release at 23,319.

34 Release at 23,320.

35 Release at 23,312.

36 15 U.S.C. § 1692e.

37 E.g., *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488-89 (M.D. Ala. 1987) ("by threatening to sue Kimber on her alleged debt, FFC violated [the FDCPA]; by threatening to sue her, FFC implicitly represented that it could recover in a lawsuit, when in fact it cannot properly do so.").

38 Release at 23,328-29.

39 *E.g., Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) (listing cases holding that FDCPA is strict liability statute and analyzing statutory text to conclude that FDCPA is a strict liability statute).

40 Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 722-23 (2006).

41 15 U.S.C. § 1692l(d); S. REP. 111-176, at 19 (noting that, despite the FDCPA, "debt collection abuses proliferate").

adhere to certain guiding principles. Foremost among them is that the primary purpose of the FDCPA is consumer protection, and therefore each and every aspect of the final rule must plausibly advance the interests of consumers.[42]

In addition, the Proposal contains a number of specific weaknesses that the Bureau must correct. Specifically—

- The Proposal would allow an excessive number of consumer contacts, in apparent contradiction to data generated by the Bureau itself showing that the frequency of telephone calls that would be allowed by the Bureau would generate significant consumer harm;

- The Proposal would allow debt collectors to escape liability for the plainly misleading and deceptive practice of filing suit, or threatening to file suit, over time-barred debt, so long as the debt collector did not know, or have reason to know, that the statute of limitations had expired, effectively unfairly placing the burden of parsing often byzantine statute of limitations rules of various jurisdictions on vulnerable consumers.

Finally, we urge the Bureau to bear in mind that, for the FDCPA and the new rules to be effective, the Bureau must vigorously enforce them against those who seek to take unfair advantage of debtors.

[42] While our comments focus on those elements of the Proposal that fall short of the FDCPA's consumer protection purpose, many of the proposed provisions do appear to be primarily aimed at consumer protection. For example, the Bureau makes proposals that would significantly improve validation notices by ensuring that notices contain sufficient information to allow consumers to validate the debt, to understand their rights in relation to the debt, and to pursue methods for disputing the debt. Release at 23,336-48. This is in response to a longstanding practice of issuing validation notices that track the statutory language of the FDCPA, which is not necessarily appropriate for a lay audience and which does not provide enough information to allow consumers to identify the debt and decide their next steps with regard to the debt. This is a prime example of appropriately putting consumer interests ahead of the interests of industry. However, even the Bureau's generally pro-consumer proposal on validation notices can be improved—the Bureau, changing course from the approach under consideration in the outline provided to the Small Business Review Panel, does not propose to require that debt collectors provide a translated validation notice to consumers who request it in a language other than English. This decision was based on a misplaced and inaccurate concern that requiring debt collectors to "provide a translation on a separate page with each validation notice could result in significant cost on a cumulative, industry-wide basis." Release at 23,352. However, the concern for cost to debt collectors is simply misplaced, as the Bureau is not tasked with minimizing industry costs. Moreover, the proposal under consideration in the SBREFA outline, and the approach urged by many consumer advocates, would not have required a translated page with each validation notice, but would have required the debt collector to provide a translated validation notice "**at a consumer's request**." Release at 23,352 (emphasis added). This is an example of the Bureau failing to put consumer's interest ahead of industry concerns.

Finally, the Bureau must carefully distinguish between regulatory clarity and substance. Providing additional clarity for various provisions of the FDCPA does not, in and of itself, fulfill the Bureau's duty under the FDCPA and Dodd-Frank. Not only is FDCPA a consumer protection statute, but it is a consumer protection statute regulating an industry that, absent strong rules, oversight, and enforcement, lacks any meaningful incentive to check abusive behavior. "Clarity" that in fact operates to remove the threat of liability for conduct that is abusive, deceptive, harassing, or otherwise in violation of the FDCPA, runs directly counter to the purposes of the FDCPA. Thus, the Bureau's primary focus must be on the substance of the Proposal, and to the extent it also seeks to promote clarity, it must do so in a way that furthers rather than undermines consumer protection.

I. THE PURPOSE OF THE FDCPA IS CONSUMER PROTECTION, AND THE FINAL RULE MUST NOT SACRIFICE CONSUMER PROTECTION FOR THE BENEFIT OF DEBT COLLECTORS.

Because the law must guide all that the Bureau does, it bears repeating that the FDCPA is a consumer protection statute, explicitly passed because Congress recognized the need to protect consumers from abusive, unfair, and deceptive debt collection practices.[43] In passing the FDCPA, Congress was **not** concerned with providing debt collectors with the most efficient or effective means of collecting debts—this is obviously so, since the statute bans some of the most effective ways of collecting a debt through harassment, threats, abuse, and deception.[44] Therefore, each and every provision of the final rule must be reasonably designed to advance consumer protection; a provision that benefits the debt collection industry by making it easier to collect debts, without credibly and demonstrably increasing consumer protection, would be a violation of the statute and arbitrary and capricious because the Bureau would have "relied on factors which Congress has not intended it" to rely on.[45]

Below, we identify some important considerations the Bureau must take into account as it determines whether particular aspects of the rule properly advance consumer protection.

A. The FDCPA protects consumers' right to make an informed decision not to pay a debt, even one that is valid.

In many ways, the FDCPA reflects a paradigmatic shift in how society views those who struggle to pay their bills. It rejected the notion that simple failure to pay a debt reflects a moral failure warranting punishment. And it should dispel any inclination to dilute the protections for

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43 15 U.S.C. § 1692 ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors.").

44 *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 659 (S.D.N.Y. 2006) ("However, just because a debt collector is permitted to continue to attempt to collect the debt does not entitle the collector to use *any* means, even if those means are the most economical or efficient.").

45 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

debtors under the FDCPA based on the outdated conviction that those in debt deserve what they get at the hands of debt collectors.

This evolution is apparent in the Senate Committee on Banking, Housing, and Urban Affairs' report on the FDCPA:

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.' In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of 'deadbeat.' This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.[46]

This view is also apparent throughout the FDCPA itself, perhaps most clearly in 15 U.S.C. § 1692c(c), which provides that if "a consumer notifies a debt collector in writing that the consumer **refuses to pay a debt**," (emphasis added) then the debt collector must generally cease communications with regard to that debt, **even if the consumer does not dispute the validity of the debt.**

Functionally, this is a recognition that a decision by a consumer not to pay a debt, even one that is validly owed by the consumer, **can be legitimate, and a consumer who makes such a decision does not deserve to be abused, harassed, or otherwise coerced into paying the debt.** Indeed, the FDCPA can be fairly viewed as protecting a consumer's right to decide whether or not to pay a particular debt without facing undue coercion from a debt collector—to decide that a particular debt, though validly owed, is not a priority for payment:

> Debt collectors routinely urge consumers to skip paying one bill to pay another. Often the bill the debt collector is encouraging the consumer to skip is the most important bill, and the collector is seeking payment on a bill that is not a priority for the consumer.[47]

The purposes of the FDCPA are advanced by rules that require debt collectors to provide consumers with full and accurate information about the debt itself, available means of settling the debt, and the potential consequences of choosing not to pay the debt, and that allow the consumer to make a decision about whether or not to pay the debt on the basis of those considerations alone.

46 S. Rep. 95-382, at 3 (1977).
47 National Consumer Law Center, Fair Debt Collection 5 (2014 ed.).

A rule that allows debt collectors to pressure consumers to pay a particular debt based on factors other than those **does not** advance the purposes of the FDCPA.

B. Consumers who do not pay their debts face real, tangible consequences.

In the FDCPA, Congress expressly observed that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts."[48] This remains as true today as it was in 1977. It highlights the fundamental distinction between legitimate means that creditors may use to collect debts, and those that Congress has determined are unacceptable as set forth in the FDCPA. And those legitimate means are formidable. It is not simply as if consumers who choose not to pay a debt can walk away from that debt scot-free, which is presumably one reason why so few consumers take out debts without intending to repay them.[49] Consumers face the potential threat of a lawsuit for failing to pay their debts, which can result in the seizure of property, wage garnishment, and reputational harm, among other undesirable outcomes. That the debt is in collection will also be reflected on consumer's credit reports, which will impact their ability to obtain credit in the future. These are real and tangible consequences that encourage consumers to pay what debts they can.[50]

It is essential that the Bureau keep this in mind as it finalizes the Proposal. Debt collectors can inform consumers of the potential consequences (in a non-threatening, non-harassing way) that flow from not paying their debts. The Bureau must ensure that its final rule does not give debt collectors the freedom and means to do more than that, by harassing consumers, threatening them with consequences that do not apply, or employing other unfair and misleading tactics. It is also essential that debt collectors be required to give information about consumers rights under the FDCPA and other applicable law, so that consumers can make fully informed decisions about whether to pay a debt.

48 15 U.S.C. § 1692(c).

49 Almost all consumers are responsible and intend to pay the debts they take on, even when there may be overwhelmingly good reasons not to do so. For example, as a result of the 2008 financial crash, over 30% of homes in the U.S. were underwater, as their mortgages were higher than the market value of their houses. However, virtually all of those homeowners continued to pay their debts on an asset that was worth less, often significantly less, than the debt itself. Ann Carrns, Most Underwater Homeowners Still Paying Mortgages, N.Y. Times (May 24, 2012), https://bucks.blogs.nytimes.com/2012/05/24/most-underwater-homeowners-still-paying-mortgages/. Relatedly, when consumers do fail to pay their debts, it is usually due to factors such as unemployment, illness, death in the family, or other reasons that make paying all or some of their debts impossible.

50 *Cf.* NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 5 (2014 ed.) ("Only a small fraction of a percent of consumers can afford to pay an undisputed debt but refuse to do so.").

C. Increased availability of credit is not inherently beneficial to consumers, and in many instances may be harmful.

The Dodd-Frank Act requires the Bureau, when formulating rules, to "consider…the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[51] This requirement means just what it says and no more—the Bureau must consider the effect of a rule on access to consumer credit. The Dodd-Frank Act does not purport to dictate what role the Bureau's consideration of consumer access to credit should play in its evaluation of a potential rule.[52] That is, Congress merely directed the Bureau to consider consumer access to credit, it did not direct the Bureau to consider increased access to credit as a consumer benefit or decreased access to credit as a consumer harm. Indeed, the Dodd-Frank Act was passed in direct response to the 2007-2009 financial crisis, which was fueled in part by too much access to credit by high-risk and non-creditworthy borrowers. This context thoroughly belies the notion that Congress intended the Bureau to be guided primarily by a mandate to increase access to credit as it formulates its consumer protection rules. In fact, the entire context and motivation for the statute are just the opposite.

This is essential for the Bureau to keep in mind, as the debt collection industry and their allies will surely implore the Bureau to avoid finalizing a strong rule with robust consumer protections, arguing that doing so could decrease access to consumer credit.[53] The Bureau should reject these specious arguments because access to credit is not *necessarily* a desirable outcome. In fact, more aggressive debt collection practices are associated with greater "access" to *high-risk* loans, which are more likely to default.[54] Giving consumers loans that they are highly likely to default on, and then subjecting them to a harsh debt collection regime that allows more aggressive debt collection tactics, can hardly be said to increase consumer welfare, notwithstanding that consumers had increased "access to credit."

D. The Bureau must not engage in an unnecessary and biased quantitative cost-benefit analysis.

The Bureau will almost certainly be inundated with comments from the debt collection industry and its allies expressing grave concern about how much a rule with robust consumer

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51 12 U.S.C. § 5512()b)(2).

52 *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 612 (1950) ("But Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these…factors should play in his final judgment.").

53 *See*, *e.g.,* Letter from Competitive Enterprise Institute to CFPB re: Debt Collection Practices (Regulation F) (Aug. 17, 2019) ("Without [debt collection], it is doubtful that consumer credit would be so widely available.").

54 *See* Lukasz A. Drozd & Ricardo Serrano-Padial, *Modeling the Revolving Revolution: The Debt Collection Channel*, 107 AM. ECON. REV. 897, 898 (observing that so-called "improvements" in debt collection practices "lead to a more prevalent use of risky loans (i.e., loans exposed to the risk of default) and hence result in a higher default rate.").

protections will cost the industry. Essentially, these comments will be an invitation for the Bureau to conduct a cost-benefit analysis that is not required by either the FDCPA or Dodd-Frank.[55] The Bureau must reject these invitations.

The FDCPA is plainly unconcerned with the costs to debt collectors of compliance with its provisions. Nowhere in the FDCPA does Congress express an intent to reduce costs for debt collectors or make their operations more efficient. Nor does it direct the Bureau to conduct any sort of cost-benefit analysis in promulgating FDCPA rules. Similarly, while the Dodd-Frank Act requires the Bureau to "**consider…**the potential benefits and costs to consumers and covered persons" and "the impact of proposed rules on covered persons," nothing requires the Bureau to conduct a quantitative cost-benefit analysis, nor does it condition the Bureau's promulgation of a rule on a finding that the quantifiable benefits of a rule outweigh the costs.[56]

It is entirely reasonable that Congress did not require any sort of cost-benefit analysis. Both Dodd-Frank and the FDCPA are designed to enhance consumer protection, not to benefit industry. Yet cost-benefit analysis, too often perceived as reasonable and objective, is almost always biased against regulation and more aptly described as "industry cost-only analysis," in which industry focuses exclusively on the costs of regulation while ignoring the benefits.[57] The potential pitfalls are especially acute here, since the practices the FDCPA was intended to address result in harms, such as "marital instability" and "invasions of individual privacy," that, while real and concrete, are simply impossible to reduce to a numerical dollar amount that can be weighed against increased compliance costs for debt collectors.[58]

II. THE PROPOSAL WOULD ALLOW EXCESSIVE CONSUMER CONTACT

The FDCPA includes a prohibition against "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass," found in Section 1692d(5). The Bureau proposes to implement this provision by placing bright-line limits on the number of times a debt collector may call a consumer with regard to a particular debt.[59] Specifically, under the Proposal, a debt collector would be allowed to call a consumer up to seven times in one week with regard to a particular debt, and would have to wait at least one week after a conversation with a consumer about a particular debt to attempt to place

55 *See, e.g.,* Letter from Competitive Enterprise Institute to CFPB re: Debt Collection Practices (Regulation F) (Aug. 17, 2019) ("Not only should the Bureau test consumer disclosures, it should also make use of rigorous cost-benefit analysis to ensure that the policy does not have unintended consequences, such as making routine debt collection more difficult.").

56 55 U.S.C. § 5512(b)(2).

57 Better Markets, *Update: Recent Trends in the Law Governing Cost-Benefit Analysis by the Securities and Exchange Commission* (Dec. 2017), *available at* https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange.

58 15 U.S.C. § 1692(a).

59 15 U.S.C. § 1692d.

another call to that consumer with regard to that same debt.[60] Under the Proposal, a debt collector that complies with the prescribed limits would have *per se* complied with Section 1692d(3), while a debt collector that violated those limits would have *per se* violated it.

Generally speaking, we agree with the Bureau that a bright-line rule limiting call frequency could benefit consumers. Section 1692d(5) is vague, and debt collectors have an incentive to test the limits of the provision, calling consumers frequently, knowing that few consumers have the resources to file a lawsuit to litigate the issue and that even when they do the debt collector has an opportunity to convince a court that it has not violated § 1692d(5). The result has been inconsistent court decisions about when frequent calling violates § 1692d(5).[61]

Unfortunately, while establishing a bright line limit on call frequency could be beneficial, the Bureau proposes a limit so high that it would serve as an invitation to legalized harassment. As the Bureau itself found, the overwhelming majority of consumers indicated that being contacted **once per week or more** by debt collectors was too often.[62] Given the Bureau's own data, it is difficult to comprehend how the Bureau arrived at its proposal to allow debt collectors to make up to **seven** calls per week, and finalizing this provision would constitute arbitrary and capricious rulemaking, since allowing that many calls would "run[] counter to the evidence before" the Bureau.[63]

Setting the call frequency limit as high as the Proposal is especially egregious when considering how this particular provision would operate. For example, technological advances, specifically the availability of predictive dialers, have increased the ability of debt collectors to place calls more frequently.[64] Moreover, the proliferation of cell phones means that frequent calls are both (1) less necessary for debt collectors and (2) more annoying for debtors to receive. Because a person with a cell phone does not physically need to be in their home (or any other particular place) to receive a call, debt collectors should need to make fewer calls to establish contact with a debtor. At the same time, because a person with a cell phone is likely to be present when their phone rings, regardless of physical location, the placement of a call is more likely to be unduly intrusive and annoying to the recipient.

In addition, the limit would only apply with regard to contacting a particular consumer regarding a **particular debt**. Thus, a consumer who happens to have two or three (or more) debts placed for collection with the same debt collector could receive two or three (or more) times the nominal "limit" on calls from that debt collector, i.e. fourteen or twenty-one (or more) calls in a single week.

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60 Release at 23,310-11.
61 Release at 23,310.
62 Release at 23,311-12. Ninety percent of consumers stated that being called more than three times per week was too often, and 74 percent said that being called one to three times per week was too often.
63 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
64 Release at 23,310.

Moreover, given that other aspects of the Proposal that would make contacting consumers much easier, it is unclear **why** debt collectors would have a legitimate need to contact consumers so frequently. For example, the Proposal would allow debt collectors to leave "limited content messages" with a consumer. This would alleviate the liability concerns that debt collectors have about leaving voicemails requesting a callback, and so would improve the ability of debt collectors to facilitate a response from consumers regarding the debt in collection. Likewise, the Proposal would alleviate the liability concerns stemming from electronic communications such as text messages and emails (neither of which would be subject to the limits on contact frequency). These provisions significantly reduce the need for debt collectors to repeatedly call consumers.

Finally, having an appropriately strict limit is especially important because under the Proposal, compliance with the call frequency limits would mean that a debt collector **could not be held liable** for violating Section 1692d(5). To take a plausible scenario under the Proposal, this means that if a debt collector has two debts in collection for a particular consumer, that collector could call that consumer **56 times over a four week period**, and the consumer would be foreclosed from arguing that the debt collector called the consumer "repeatedly…with intent to annoy, abuse or harass" that consumer, notwithstanding that it is difficult to imagine how the debt collector's intent in making those 56 phone calls could, in fact, have been anything other than to annoy or harass the consumer. This would be an unacceptable outcome.

In summary, the limit on call frequency should be significantly lower, given (1) the data available to the Bureau about consumer preferences; (2) the fact that any limits on call frequency would lead to the same consumer being contacted much more often than the nominal limits; (3) the fact that debt collectors under the Proposal would have a significantly greater ability to contact consumers through a variety of channels; and (4) the immunity from liability that compliance with the limit would create for debt collectors.

III. DEBT COLLECTORS SHOULD BE STRICTLY LIABLE FOR VIOLATING PROHIBITION ON SUITS OR THREATS OF SUIT FOR TIME-BARRED DEBT.

We agree with the proposal to codify the well-settled principle that that suing or threatening to sue on a debt that is time-barred is a misleading and deceptive practice that violates the FDCPA. However, it would conflict with the letter and spirit of the statute for the Bureau to provide that a debt collector only violates this provision if it knows or should know that the statute of limitations has run on a debt.

It is well-settled that the FDCPA is a strict liability statute.[65] The Bureau should only depart from this regime for a compelling reason that plausibly advances consumer protection. The Bureau's reasoning for importing a "know or should know" requirement is that "determining

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65 *E.g., Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) (listing cases holding that FDCPA is strict liability statute and analyzing statutory text to conclude that FDCPA is a strict liability statute).

whether the statute of limitations has expired can be complex" and "may involve analyzing which statute of limitations applies, when the statute of limitations began to run, and whether the statute of limitations has been tolled or reset."[66] This claim appears to be exaggerated, especially in this age of easy access to legal and other records that might bear on questions surrounding the statute of limitations. However, even if true, it does not justify the Bureau's proposed knowledge standard. Instead, it raises the question: Who should bear the cost, and associated risk, of determining whether the statute of limitations has run? The answer, plainly, is debt collectors.

If it is difficult, in any particular situation, for a debt collector to determine whether or not the statute of limitations has run, it will be nearly impossible for consumers to make that determination. The simple fact is that debt collectors have an enormous advantage over consumers. Debt collectors who choose to litigate are represented by counsel who, being experienced debt collection litigators, no doubt know how to navigate even complex statutes of limitations. Not only do consumers in debt collection actions rarely have counsel, they rarely even contest lawsuits filed by debt collectors at all—the overwhelming majority are won by debt collectors on default judgment, based solely on the allegations in the complaint.[67] In other words, in the overwhelming majority of cases where a debt collector sues a consumer, even if the statute of limitations has run and the consumer has a complete legal defense, the debt collector will nevertheless prevail, essentially resulting in a windfall for the debt collector. Moreover, a consumer who makes a payment on a time-barred debt may risk restarting the clock on the statute of limitations, a trap for the unwary that could cause consumers to unknowingly give up a complete legal defense they would have to a debt collection lawsuit.

Given all of those factors, including the potential for grievous consumer harm, changing the standard cannot be consistent with the statute. Therefore, it is not unreasonable that debt collectors who **choose** to sue or threaten to sue should assume the risk of liability that the statute of limitations has run, without regard to whether they knew or should have known it had.

IV. IN ORDER TO BE EFFECTIVE, THE BUREAU MUST VIGOROUSLY ENFORCE FDCPA AND REG. F VIOLATIONS

The final form that the Bureau's regulations take is, of course, of paramount importance. The regulations will define the standards of conduct for debt collectors and, importantly, will impact the potential scope of lawsuits brought by consumers. However, Bureau enforcement of the FDCPA and Reg. F is vital to ensuring that consumers are fully protected from abusive debt collection practices. The barriers to private lawsuits are well-known—they are expensive, time-consuming, and fraught with significant risk regarding the outcome and amount of recovery. These barriers are especially prevalent in the debt collection context, since potential plaintiffs are often already struggling financially, and thus even less likely to be able to devote resources to a lawsuit. In this context, debt collectors have an incentive to engage in conduct that violates the

66 Release at 23,329.
67 Release at 23,329.

FDCPA, because they know that even conduct that clearly violates the FDCPA will only rarely result in a lawsuit. The CFPB must enforce its debt collection rules with enough vigor to meaningfully deter FDCPA violations—debt collectors must come to understand that FDCPA compliance is a matter of business survival.

In the Bureau's short history, it has earned a reputation as one of the premier regulatory enforcement agencies in the federal government, holding wrongdoers accountable for their illegal conduct and returning billions of dollars to millions of consumers, almost all of whom would have struggled to vindicate their rights in private lawsuits.[68] However, since the end of 2017, the CFPB's robust enforcement activity has significantly slowed. In 2018, the CFPB brought only 11 enforcement actions, the fewest since 2012, which was the first full year of the Bureau's existence, and less than half the number from the next lowest year (26 in 2013). In 2019, the CFPB has brought only 19 enforcement actions as of the date of this letter—a slight improvement from 2018, but still far short of the admirable pace the CFPB previously set.[69]

If the CFPB continues this trend of languishing enforcement, lawbreaking debt collectors will have prevailed no matter what the ultimate outcome of this rulemaking, because they will have been granted the ability to violate the FDCPA with little fear of meaningful consequences.[70]

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68 CFPB Factsheet: Consumer Financial Protection Bureau By the Numbers (Dec. 2016), https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf.

69 In public remarks, Director Kraninger has argued that "supervision is the heart of this agency," while enforcement will apparently be reserved for "bad actors." Speech at the Bipartisan Policy Center By Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau (Apr. 17, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/. This conception, while facially appealing, is fundamentally flawed. Few doubt that supervision is a vital aspect of the Bureau's work, and few doubt that many issues can be remedied through the supervisory process without referral for an enforcement action. However, supervision is properly viewed as an appropriate vehicle to remedy weaknesses in systems and controls that might impair a company's "ability to detect, prevent, and correct practices that present a significant risk of violating the law and causing consumer harm." CFPB Supervision Manual at 4. Violations of law that have already occurred are properly remedied through the enforcement process—without regard to whether the violation comes about because the company is a "bad actor" in the Bureau's judgment. Scaling back enforcement in favor of remedying violations of law through the supervisory process is tantamount to printing an endless supply of get-out-of-jail free cards.

70 Another disturbing trend that the debt collection industry surely appreciates is the Bureau's lending its authority to supporting the **industry's** position in litigation. On November 14, 2018, the Bureau filed an amicus brief urging a hypertechnical reading of the FDCPA that would exclude those who engage in nonjudicial foreclosure from the definition of "debt collector," removing the protections of the FDCPA for millions of homeowners facing foreclosure. Amicus Br. of United States, *Obdusky v. McCarthy & Holthus LLP,* No. 17-1307. Apparently, this was the first amicus brief ever filed by the CFPB supporting an industry position, and contradicts the prior position of the CFPB, as articulated in an amicus brief filed in a case in the Ninth Circuit. Am. Br. of CFPB, *Ho v. Recontrust Co., N.A.*, No. 10-56884. More recently, the CFPB has filed an amicus brief urging

CONCLUSION

We hope these comments are helpful as you evaluate the Proposal.

Sincerely,

Dennis M. Kelleher
President & CEO

Stephen W. Hall
Legal Director and Securities Specialist

Jason R. Grimes
Senior Counsel

Better Markets, Inc.
Suite 1080
1825 K Street, N.W.
Washington, D.C. 20006
(202) 618-6464

dkelleher@bettermarkets.com
shall@bettermarkets.com
jgrimes@bettermarkets.com

www.bettermarkets.com

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the Supreme Court to adopt a stringent interpretation of the FDCPA's statute of limitations, that would make it more difficult for consumers to bring claims for violations of the FDCPA, even in cases where the plaintiff **could not have known about the alleged FDCPA within the limitations period.** Amicus Br. of United States, *Rotkiske v. Klemm*, No. 18-328.